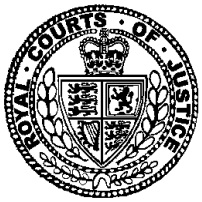

Neutral Citation Number: [2020] EWCA Civ 1755

Case No: B4/2020/1944

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT GUILDFORD
HH Judge George
ZC20C00633

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE BAKER
and
LORD JUSTICE ARNOLD

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF Z (INTERIM CARE ORDER)

Between :

AK	**Appellant**
- and -	
A LONDON BOROUGH COUNCIL (1)	**Respondents**
RS (2)	
Z (by his children's guardian) (3)	

- -
- -

Dorian Day (instructed by **Morrison Spowart Ltd**) for the **Appellant**
Richard Harris (instructed by **Local Authority Solicitor**) for the **First Respondent**
Trisan Hyatt (instructed by **Universe Solicitors**) for the **Second Respondent**
Olivia Magennis (instructed by **Creighton and Partners**) for the **Third Respondent**

Hearing date: 17 December 2020

- -

Approved Judgment

LORD JUSTICE BAKER:

1. These proceedings concern a 15-year-old boy, Z. On 12 November 2020, HH Judge George placed Z in the interim care of the local authority on the basis of a care plan which provided that he should be removed from his father's home and placed with foster carers as a bridging placement with a view to placing him in due course in the care of his mother. His father now seeks permission to appeal against that order. On 4 December, I listed the application for permission to appeal for a full hearing, with appeal to follow if permission granted.

2. The background can be summarised as follows. Z is the younger of two sons of parents who separated in 2016 following a long marriage. Both Z and his elder brother, D, now aged 19, had been diagnosed as being on the autistic spectrum. Following the breakdown of their marriage, the parents have conducted extensive private law proceedings concerning the boys. During that period, the boys have resided with their father and have had only limited contact with their mother. The mother remains living in the former family home while the father and the two boys live in small rented accommodation.

3. In December 2016, the mother filed an application for orders under s.8 of the Children Act 1989. The application was initially listed for a fact-finding hearing to determine cross-allegations by the parents. In the event, however, that hearing did not take place. A children's guardian was appointed at that stage and has remained involved in the proceedings ever since. Her initial analysis in 2017 included the observation that the boys had aligned themselves with their father who was "unable emotionally to give his permission for the children to have a relationship with their mother". She proposed a child arrangements order for the boys to live with both parents under a shared care arrangement, supported by therapeutic intervention and local authority support in the form of a family assistance order. On 3 October 2017, the court made a child arrangements order providing for the boys to live with both parents, spending alternate months with their mother. In addition, with the support of the local authority, the court made a family assistance order for 12 months.

4. In the event, the shared care order never took effect. The boys continued to live with their father and their contact with their mother was only intermittent. In July 2018 the mother applied for the renewal of the family assistance order and in September 2018 for enforcement of the child arrangements order. In the course of those proceedings, a report was commissioned from a child and adolescent psychologist, Ms Alice Rogers, who reported that Z was alienated from his mother and displaying signs of emotional harm. There were also concerns about his school attendance. This led the court, on the application of the guardian, to order a report from the local authority under s.37 of the Children Act. That report, completed in March 2019, concluded that Z was suffering significant harm as a result of the care provided by his parents. Despite this conclusion, the report did not recommend any proceedings under Part IV of the Act but, rather, a series of other measures under a child protection plan. At a hearing in April 2019, at which the guardian expressed the view that a supervision order was required, the court stated that it had grave concerns that no public law proceedings were being issued. Under the statutory scheme of the Children Act, of course, the court has no power to direct a local authority to issue proceedings,

5. Attempts at therapy and mediation failed to bring about any improvement in the relationship between Z and his mother. Face-to-face contact stopped in September 2019. Despite the guardian's efforts, no progress was achieved and it seems the proceedings were drifting. Notwithstanding concerns about the father's failure to promote Z's relationship with his mother, and Z's attendance at school, it was the local authority's view that the child protection plan was sufficient intervention and that no court order was required.

6. On the guardian's further application, the court ordered a supplemental report from Ms Rogers. Because of restrictions imposed as a result of the Covid-19 pandemic, her assessment was carried out via a telephone conversation with Z and a Skype call with his father. In her supplemental report, dated 16 April 2020, she summarised her opinion in these terms:

> "Z remains extensively alienated from his mother; indeed, the situation is much worse than the last time I saw him, and he has had no contact with his mother for over six months now. He has attended school very little during year 10, which will have deeply damaged his educational prospects. Z's presentation during clinical interview was somewhat improved, and he is no longer talking repeatedly of hurting other people or reporting suicidal thoughts ….
>
> [The father] remains rigidly preoccupied with his sense that his wife should go and live with her family and give the house to him and the boys. Although he denies having influenced the boys, it was striking how similar his complaints are to Z's; both use the same words …. It is quite possible that [the father] doesn't have to say much now in order to alienate Z, but it is likely that he continues to say things, and to subtly reward rejection of [the mother]. I am absolutely clear in my opinion that he tries to obstruct the relationship ….
>
> If the situation is left as it is, this fundamentally means the acceptance of [the mother] entirely losing all relationship with both of her sons, and Z losing any chance of a relationship with his mother. It also means accepting that this 1- year-old-boy will not attend school or get an education. This is not tenable, and there should be a transfer of residence for Z to live with his mother. This will need to be done via a bridging placement; Z will need a chance to be parented effectively by trained carers, in order that he can learn that a typical boundary (you need to go to school even if you got a detention) is not abuse. He needs opportunity to reconnect with his mother, and develop a relationship with her.
>
> There is clearly a concern about [the father] setting out to poison Z against his mother further by telling him that this is her fault and what she wants. The social worker will need to intervene robustly to prevent this, but I would also recommend that action is taken as soon as is possible."

7. At a case management hearing in April following the filing of this report, the guardian supported Ms Rogers' recommendation. The local authority acknowledged that the threshold criteria under s.31 of the Children Act were satisfied and indicated that it intended to instigate pre-proceedings procedures under the Public Law Outline in the Family Procedure Rules. A supplemental s.37 report was ordered to be filed by 20 July 2020 and the proceedings were listed for a final hearing in September 2020. In the event, the s.37 report was not filed on time and indeed not available when the matter came before the court for a pre-trial review. At that review, the father indicated he wished to pursue findings of fact against the mother and was directed to file a schedule of the findings he would invite the court to make.

8. Meanwhile, parenting assessments had been prepared by an independent social worker, Ms Francesca Serrette. Her report about the father had concluded that he remained fixated on historical issues about the marital relationship and had demonstrated that he was unable to separate his own emotional responses from the well-being of his child. He consistently cited the mother's behaviour as the catalyst for the current situation and the harm allegedly caused to Z. Ms Serrette observed that Z had begun to make identical complaints about the mother and there was a view that he was being unduly influenced by his father's views. It was considered that his diagnosis of autistic spectrum disorder left him more susceptible to influence and significantly vulnerable. The father's own rigid thinking rendered him unable to understand or accept the impact of his parenting style. Ms Serrette concluded that, as a result, the father would be unable to support Z's healthy growth and development. Although there were positive aspects of his parenting, in particular his basic care and his emotional warmth towards his son, he continued to find it difficult to separate his own feelings towards the mother from Z's need to have a relationship with her. Ms Serrette also raised concerns about the father's management of Z's psychological development, specifically around the area of resilience, and noted that Z appeared to be under-stimulated and that there were issues around guidance and boundaries. Ms Serrette noted Ms Rogers's recommendation but raised concern about the impact of such a significant change for Z and whether such a move would potentially generate further harm, given his current views and understanding of the world, his parents and his experiences.

9. Ms Serrette also produced a parenting assessment of the mother which it is unnecessary to consider for the purposes of this appeal.

10. It was not until shortly before the start of the final hearing that the local authority filed it supplemental s.37 report, prepared by the allocated social worker, Ms Eniola Alamutu. She identified a number of areas where Z was suffering harm. In the light of the information it had garnered, including the reports of Ms Rogers and Ms Serrette, the local authority reported that it would be issuing proceedings seeking an interim care order with a view to Z moving into a bridging foster placement. Ms Alamutu observed:

> "The local authority agrees with Ms Rogers in the view that Z should not move immediately to his mother's care as he needs time to re-establish a relationship with his mother, and would need to understand that normal, reasonable boundaries are a part of family life."

Notwithstanding this conclusion, by the start of the hearing on 28 September 2020, the local authority had not identified an appropriate placement, nor started care proceedings.

11. During the course of the private law proceedings, the solicitor appointed to represent Z, Ms Marsden, had considered whether he was competent to give instructions. On each occasion, she concluded that he lacked the necessary understanding. The last occasion when the solicitor had reviewed this issue prior to the hearing in September 2020 was on 18 July 2020, although she spoke to Z again on 23 September. In a position statement filed by Ms Marsden on 24 September, she reported in these terms:

> "While a superficially articulate young person, Z shows little to no insight, and no reflective capacity which would allow Ms Marsden to consider him competent to provide instructions to her. He demonstrates a rigidity of thought and entrenched position which has not abated, and concrete thinking which has not evolved or developed during these lengthy proceedings …. He does not express an interest in the court process, writing to the judge, visiting the court or becoming involved in the proceedings … The children's guardian does not consider that Z is competent. Her view is that he is so entrenched in his views and so alienated by [the father] as his primary care giver, he is unable to form his own opinion on whether he should have relationship with his mother.
>
> Most recently, the guardian and the solicitor for the child spoke with Z by way of Zoom meeting on 18.7.2020. Z is still completely hostile to his mother and wants nothing to do with her. He says he doesn't trust her. He speaks to her on Fridays and Sundays. At one point during the interview, Z said [recorded verbatim] "here is something I want to add….the only thing is I still haven't changed my view. People try and make it better for families, but every family is different, families are not perfect - they should not be stuck together. I have made my point for so many years, I don't want any contact, if I did change my mind I would let you know. I don't want to see her anymore. More and more people involved, but I don't want to see my mum anymore and don't want any contact with her at all". Z said he did not want to have the court process going on, or be involved with it.
>
> The solicitor for the child is clear that Z can present as articulate and has very carefully considered his ability to instruct her directly. The solicitor for the child is acutely aware of Z's age, being 15 and his very firm views about not having a relationship with his mother. Z has been reassured that these views will be firmly put to the court. The solicitor for the child after much consideration concludes that Z does not have sufficient understanding to instruct her directly and is not a competent child."

12. What was listed as the final hearing of the private law proceedings extended over three days starting on 28 September. On those days, Judge George heard oral evidence from Ms Rogers, Ms Serrette, and the local authority social worker [name]. At the conclusion of their evidence, the judge adjourned the hearing.

13. She explained her reasons for taking this course in an interim judgment delivered on 9 October 2020:

> "At the conclusion of the professional evidence I found myself in difficulties. None of the witnesses suggested that Z should stay with his father and none suggested that he should move straight to mother. Further the local authority had no placement for him and had not issued proceedings.
>
> As a consequence, I did not consider that I was able to make any final decision on what was in Z's best interests particularly with the local authority's position clear but no placement identified.
>
> I suggested dealing with the factual allegations but there was missing police disclosure as a consequence of the allegations being raised so recently in the proceedings.
>
> I therefore felt I had no option but to adjourn the proceedings which I did very reluctantly. They have been adjourned until 20 October 2020 with the local authority agreeing to issue by 16 October regardless of placement."

14. The judge concluded with these observations:

> "I am afraid I remain pessimistic about the prospects of Z's relationship with his mother being restored, fact find or no fact find; care proceedings or no care proceedings.
>
> I consider the local authority has delayed in providing positive and constructive assistance to this family and in particular to these children over four years and as a result the relationship with their mother may have been fractured forever."

15. The order made at the conclusion of the hearing on 30 September included recitals inter alia in the following terms:

> "…UPON the local authority indicating at the outset of the hearing its intention to issue care proceedings once an appropriate foster placement has been identified for Z
>
> AND UJPON the court hearing evidence from Ms Rogers, Child and Adolescent Psychologist, Ms Serrette, Independent Social Worker , and Ma Alamutu, Allocated Social Worker
>
> AND UPON the court concluding that it was not possible, having hard the professionals above, to conclude a final hearing in the private law proceedings when there are care proceedings

> proposed and the court providing written reasons for this adjournment (to follow) which are to be shared with the [local authority]
>
> AND UPON the court adjourning the fact-finding element of this hearing, pending the further disclosure of documents by the local authority, to include any relevant police notifications or reports that the local authority currently holds
>
> AND UPON the local authority confirming that it will issue care proceedings without further delay and in any event by no later than 16 October 2020
>
> AND UPON the Court indicating that any application under s.31 Children Act 1989 shall be referred to HHJ George for directions and those proceedings shall be consolidated with the private law proceedings to be listed at the adjourned hearing listed below"

Under paragraph 1 of the order, the private law proceedings were adjourned to 20 October with a time estimate of one hour.

16. In the event, it was not until 20 October that the local authority filed an application in the Central Family Court under s.31 seeking a care order in respect of Z. The care proceedings were issued in the Central Family Court but on the same day the justices' legal adviser acting as "gatekeeper" transferred the proceedings to the Family Court at Guildford where Judge George sits. On 27 October, the Guildford court issued a notice of hearing stating that "the Interim Care Order hearing for this matter will be heard by this court remotely via CVP … on 12 November 2020 at 10am with a time estimate of 90 minutes".

17. On 5 November, the local authority filed a care plan in which, having recited the recommendations of Ms Rogers, it set out its proposed placement in the following terms (at paragraph 4.1):

> "The local authority seeks an interim care order to enable Z to be placed in a bridging foster placement to the care of his mother …. The local authority is of the view that Z has not been in the care of his mother for years and throughout the course of those years there has continued to be a strain on their relationship despite the interventions put in place by professionals. For this reason, it will be vital for Z to be placed within a bridging placement prior to Z being placed in the care of his mother."

Under the heading "arrangements for re-unification" (at paragraph 4.6), the care plan stated

> "The local authority does not propose re-unification to [the father] as there are significant concerns around his ability to parent Z …. The local authority's care plan is for Z to be placed in the care of his mother after 3 to 6 months of being placed within a bridging foster placement."

18. At the hearing on 12 November, the mother and the guardian supported the local authority's application for an interim care order. The father, who had changed solicitors since the previous hearing in the private law proceedings, opposed the application and asked the court to adjourn the hearing to enable him to prepare his case. Having heard submissions, the judge delivered a judgment which has now been transcribed for the purposes of this appeal.

19. The judge began by recording that, having conducted an assessment in September during the private law proceedings, Ms Marsden had concluded that he was not competent to give instructions. The judge then summarised the background to the application and the evidence she had considered in the September hearing from Ms Rogers, Ms Serrette and Ms Alamutu. She noted the local authority's case that Z continued to be exposed to the difficult relationship between his parents, that there were concerns about the father's ability to provide sufficient guidance and boundaries, and that there were ongoing problems with Z's education. The judge noted that he had been attending school more regularly since September but that the relationship between Z and his father and the school remained very difficult.

20. The judge rejected the father's application for an adjournment, on the grounds that there had been sufficient time for preparation by his new solicitor and that there had already been significant delay in resolving the issues in the proceedings. She then considered the statutory threshold under s.38 of the Children Act for making an interim care order and concluded "given the wealth of evidence, that there are reasonable grounds to believe that the care Z is receiving is likely to cause or is at risk of causing significant harm".

21. The judge then considered what she described as the second hurdle for the local authority to overcome, namely whether or not the court would authorise removal. In this context, she reminded herself of the summary of the legal principles to be considered as summarised by Peter Jackson LJ in *Re C (A Child) (Interim Separation)* [2019] EWCA Civ 1998 at paragraph 2. She cited the following passages from that paragraph:

> "(1) An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.
>
> …
>
> (4) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.
>
> (5) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to

> inform the court of all available resources that might remove the need for separation."

22. The judge noted that this case,

> "we have perhaps more complete evidence than one might otherwise have."

She continued:

> "Clearly, the intention in this case is to place Z where further assessment can be made of his needs and for his relationship with his mother to be assessed and reinstated which, for his emotional and psychological needs, is important. It is not a situation where the court is making any final decision and as I said in my judgment on the adjournment [i.e. of the private law proceedings], I am not, in fact, hopeful of that relationship being restored in the long term. Clearly, the removal of a child from a parent is a clear interference with their right to respect for family life under Article 8. Therefore, the court has to be satisfied that it is both necessary and proportionate to remove a child at the interim stage. Unusually in a case like this, we have a child who is 15 who is being removed."

23. With regard to Z's wishes, the judge stated:

> "The key for a 15-year-old boy, where the plan is removal from his father and in circumstances where he has been diagnosed as suffering with ASD, is the balance of harm. [Father's counsel] was concerned that Z's views were not before the court. I am absolutely clear that Z's views are, first of all, that he does not wish to leave his father, secondly, that he does not wish to have any contact or, indeed, any relationship with his mother, and, thirdly, that he does not wish to go into foster care and I take those views very much into account given his age."

The judge also noted that Z had threatened to harm himself if removed from his father and that this was a factor to be taken into account. She continued:

> "He is currently with his father where he feels secure. He is currently attending school more than he has done recently and those are matters that have to go in one side of the balance. However, set against that is the fact that it is still very difficult for the father and Z to manage the relationship at school …. Z's relationship with his mother, while he is with his father, is very, very limited and hostile. The professional evidence that is before the court suggests that there are real risks to Z of not having proper boundaries. He is at risk of emotional harm and clearly at risk of his mental health long-term."

24. The judge then set out her conclusion in the following terms:

> "On balance and it is finely balanced, I do think it is both necessary and proportionate for the court to make an interim care order with the care plan for removal. His emotional and psychological welfare, in my view, requires removal at this stage. It will enable further assessments to be prepared and for further work to be done with Z. It is not clear that it will be possible to do that work while he remains at father's."

She added:

> "I would stress that this is an interim order. No findings have been made and the court will have to consider carefully any final placement for Z."

25. The order made following the hearing on 12 November was on the standard case management order form. Under paragraph 12, headed "The Parties' Positions", the order recorded

> "the local authority sought an interim care order with a care plan of removal of Z from his father's care to foster care while his relationship with his mother is rebuilt, with a view to Z moving to his mother's care in future."

Paragraph 14 included inter alia a recital "upon the Court being satisfied that Z currently is not competent to instruct a solicitor himself". Paragraph 15 of the order provided that "in the interim, Z is placed in the care of [the local authority] until the finalisation of the proceedings or further order". Other orders under paragraph 17 included the consolidation of the proceedings with the private law proceedings, the listing of the matter for a case management hearing on 8 December, and a direction to the parties to obtain transcripts of the oral evidence given by the three professionals at the hearing in September.

26. No application was made for permission to appeal or for a stay of the order. Z was therefore moved from his father's home and placed in foster care. We were informed that he saw his father regularly in the first week following his removal but thereafter has had no direct contact because of difficulties arranging a supervisor. Telephone contact has continued on a limited basis. Z has not seen his brother since leaving the home.

27. On 3 December, the father's solicitor filed a notice of appeal against the interim care order. On the same day, I listed the application for permission to appeal for an oral hearing on the following day. At that hearing, I adjourned the application for permission to a further hearing, with appeal to follow immediately if permission granted. I gave directions, including a direction for the filing of a transcript of the judgment delivered on 12 November. In the event, that transcript was delayed because of difficulties at the transcribers' office and the hearing before this Court ultimately took place yesterday on 17 December. At the conclusion of the hearing, we reserved judgment until this afternoon.

28. On behalf on the father, an application was made to admit fresh evidence in support of the appeal, consisting of a draft statement from the father himself, to which were

exhibited text messages and a letter written by Z. We decided to consider that material *de bene esse* pending the oral submissions made to us. For my part, I do not consider this fresh evidence is directly material to the issues we have to determine. Much of the focus is on events since the hearing on 12 November and, in particular, the difficulties that have arisen over contact. It is clear from Z's text messages and letter that, as anticipated by the judge, he is deeply unhappy about having been removed from his father's care.

29. The original grounds of appeal drafted by Mr Day on the basis of a note of judgment rather than the approved transcript were in the following terms. It is alleged that the judge

(1) failed to carry out any proportionality exercise under Article 8(2) of ECHR;

(2) failed to give any or any sufficient weight to the views and wishes of Z, a mature 15-year-old child;

(3) erred on the facts in that there was insufficient evidence for her to be satisfied that any harm suffered by Z required his immediate removal;

(4) pre-empted and prematurely determined the move to a non-family placement without the necessary or adequate evidence when that issue should have awaited the final hearing of the care application;

(5) was wrong to sanction the separation of the child from his father as the child's safety did not require interim protection;

(6) erred in law by determining that his removal was warranted on account of the need for "further assessment";

(7) failed to conduct any or any sufficient balancing exercise to as to the impact and undoubted harm of removal when compared with the harm that Z would suffer remaining at home in his father's care, and

(8) failed to give any or any sufficient weight as to the impact of the removal from the home he was sharing with his father and brother where he was happy and where his father was providing "good enough" care.

30. Following observations made by me at the hearing on 4 December, Mr Day has sought to amend his grounds of appeal by adding an additional ground. He asserts that the interim care order was wrong, procedurally irregular and caused injustice. In particular,

(a) having embarked on the process of hearing live evidence, the judge should have concluded the exercise before deciding whether to make the interim care order;

(b) whilst it was open to the court to determine an application for interim care order and approved removal of the child thereunder without hearing any live evidence, once the judge had embarked on hearing the evidence she should have proceeded to hear all of it before reaching a decision;

(c) the process infringed the father's right to a fair trial;

(d) the judge had failed to make findings of fact which was a fundamental bedrock required before sanctioning the child's removal;

(e) the judge made no or insufficient enquiries as to the capacity of the child to give instructions directly and be separately represented before the court;

(f) as a result of these irregularities the decision was both unjust and a breach of the article 6 and 8 rights of the father and Z.

31. Mr Day cited a large number of reported authorities in which courts have made observations about the right approach to applications for interim care orders, and he deployed a wide range of arguments in support of these various grounds of appeal which contain a substantial element of repetition. I mean no disrespect to him by highlighting only the following arguments which seem to me to encapsulate the essential complaints made by his client.

32. First, it is submitted that the interim care order was disproportionate and made without evidence that any harm suffered by Z required his immediate removal. It is argued that the judge failed to carry out a proper balancing exercise of the harm of removing Z against the harm he might suffer from remaining at home. She failed to give proper consideration to the impact on Z of removing him from the home where he was happy and settled.

33. Secondly, it is argued that it was unfair of the court to make an interim care order having heard only the evidence of the professional witnesses and no evidence from the father. The judge was obliged to complete the evidence enquiry before making the draconian order of removing the child from his home and settled existence. The course adopted by the judge infringed the ancient principle *audi alteram partem* and the requirement to hear both sides which Mr Day described as a fundamental cornerstone of Article 6. Mr Day cited the decision of this Court in ***Re N (Children) (Interim Order/Stay)*** [2020] EWCA Civ 1070 and in particular the judgment of Peter Jackson LJ at paragraph 31:

> "It is understandable that the judge did not feel able to deal with the issue before her on submissions only and that she needed to hear some evidence. However, once she had decided to do that, fairness required that in this situation she should hear from both the accuser and the accused. There will be cases, for example where the court needs to hear and evaluate professional opinion, where it will be proper to hear from witnesses from one side only. This was not such a case. The investigation was a factual one into events where the parents were primary witnesses. It is no answer to say that the court would not have been helped by hearing their denials. They were not making bare denials but giving possible explanations for much of the evidence brought against them and, at least on paper, those explanations were not self-evidently implausible and deserved proper consideration. However, instead of taking them at face value (whatever that might be taken to mean), the judge largely left them out of account. The investigation that was carried out was therefore not fair and effective."

34. Thirdly, it is contended by Mr Day that the judge failed to attach any or any sufficient weight to Z's wishes and feelings. Furthermore, given Z's age, the judge should have considered carefully the question whether he was competent to provide instructions. Mr Day relied in particular on the judgment of Williams J in *Re CS (Appeal FPR 2010, Rule 16.6: Sufficiency of Child's Understanding)* [2019] EWHC 634 (Fam) in which the judge set out an extensive analysis of the factors to be considered by the court when determining whether a child has sufficient understanding to give instructions to conduct an appeal. He submitted that the judge failed to conduct any or any sufficient enquiry as to competence but instead relied entirely on the position statement prepared by the solicitor for the child dated 24 September 2020.

35. In reply, Mr Harris on behalf of the local authority, who had the benefit of the transcript before drafting his written submissions, points out that the judge referred on two occasions to proportionality in the course of the judgment and therefore submits that it can be safely assumed that she bore this in mind when reaching her decision. He argues that, contrary to Mr Day's submission, there was an unusual abundance of evidence for a first interim care hearing on which the judge was entitled to rely. That evidence demonstrated that Z was continuing to suffer serious harm in his father's care and the court's intervention could not await a final hearing that was likely to be many months away. The judge specifically referred to a "balance of harm test" and there is ample evidence that she recognised the need for a balancing exercise and duly carried it out.

36. Mr Harris submits that the complaint made on behalf of the father that the process adopted by the judge infringed his right to a fair trial conflates the procedural requirements for the final hearing in the private law proceedings with the procedural requirements for the interim care order application. The fact that the oral evidence was stopped prior to the mother, father and guardian giving oral evidence at the discontinued final hearing did not render the process of the interim care order hearing unfair, confined as it was to an examination of interim threshold, whether an order should be made, and whether immediate separation was required. The decision was necessarily limited to issues that could not await the final hearing and the judge was careful not to make findings of fact at that stage. Mr Harris adds that, in any event, no application was made at the hearing on 12 November for the father or any other witness to give oral evidence

37. It is clear from the judgment that the judge was acutely aware of Z's wishes and feelings and took them into account. It is not accepted by the local authority that Z is a mature 15-year-old. The evidence of Ms Rogers shows that he has particular vulnerabilities and is suggestible. As to capacity, it is submitted that the judge was entitled to rely on the recent assessment carried out by Z's solicitor. Mr Harris draws attention to the judge's observations in her judgment on 12 November that no one had challenged Ms Marsden's assessment and that the question of competence would be kept under review.

38. On behalf of the mother, Ms Hyatt adopted the submissions put forward on behalf of the local authority. The judge recognised she was faced with a number of competing rights and imperfect solutions. In the exercise of her discretion, she selected the route which best navigated the difficulties. Her decision was unimpeachable and certainly not "wrong".

39. On behalf of the guardian, Ms Magennis submits that the judge clearly had the proportionality of the proposed removal at the forefront of her mind and considered that

the proposed move was proportionate. Ms Magennis submits that the father's complaint that the evidence was insufficient to justify immediate removal overlooks the longstanding concerns as to Z's emotional welfare in the care of his father and the consequences for him of the total cessation of his relationship with his mother. Similarly, the father does not acknowledge the longstanding concerns about Z's attendance at school. Ms Magennis points out that Ms Rogers, Ms Alamutu and the guardian all analysed the balance between the immediate significant harm being suffered by Z in his father's care against the risks involved in his removal. It is submitted that the evidence of immediate harm was overwhelming and entirely justified the judge's decision. The interim order did not pre-empt the final decision, as the judge was at pains to make clear in her judgment.

40. Ms Magennis points out that no party invited the court to hear oral evidence at the hearing on 12 November and that is therefore surprising to find the father now suggesting that the court's approach was procedurally irregular. The father had had six weeks between the adjournment of the private law proceedings on 30 September and the hearing of the application for an interim care order in which he could have filed a statement, but had not done so. The judge's decision to refuse an adjournment was perfectly understandable given the urgency of the situation. The judge was obviously alive, as were the three professional witnesses and the guardian, to the ever-narrowing window of opportunity to effect any change in Z's relationship with his mother and an equally narrowing window of opportunity to save his education. It was therefore entirely appropriate for the judge to proceed as she did on 12 November. The court was under no obligation to make any findings of fact at that stage. Such findings are not a "fundamental bedrock" for sanctioning the removal of the child. In fact, at the outset of proceedings when considering whether to make an interim care order, the court is usually not in a position to make any findings. Section 38 does not require the court make findings, nor to be satisfied that the s.31 criteria are proved but rather to be satisfied that "there are reasonable grounds" for believing that the threshold criteria are made out. Ms Magennis submitted that this case fell into the category identified by Peter Jackson LJ in ***Re N*** where the evidence adduced from Ms Rogers, Ms Serrette and Ms Alamutu consisted of professional opinion rather than factual matters. As a result, fairness did not in this case require the father to be given an opportunity to give evidence before a decision was taken as to whether or not the interim care order should be made.

41. Ms Magennis submitted that it is clear from the transcript of judgment that the judge was very clear as to Z's wishes and recited his views accurately. Despite his age she was entitled to make a decision contrary to those expressed wishes and feelings if she considered it to be in his best welfare interests to do so. Criticisms of the judge's approach to the question of Z's capacity are misconceived because the court had before it the clear view as to competence expressed by the child's very experienced solicitor.

Discussion

42. This is a very troubling case. All the professionals involved with the family and the judge were rightly extremely concerned about Z's extensive difficulties, in particular the breakdown in his relationship with his mother and his erratic school attendance, plus the growing evidence that the father was failing in a number of respects to provide him with appropriate care. The judge was understandably frustrated by the approach of the local authority which seemingly did not treat the case with the urgency it demanded. By the end of the hearing in September, and probably earlier, she had reached the

conclusion that Z needed to be removed from his father's care, but was unable to put that plan into effect until the local authority had identified a placement and started care proceedings. Once the local authority had taken those steps, the judge decided to act quickly to protect Z from further harm. Her judgment demonstrates that she considered relevant factors conscientiously, including Z's wishes and feelings and the balance of harm which he would suffer depending on which course she took.

43. For my part, I do not think it can be said that her decision that Z should be removed from the family home was necessarily wrong. What concerned me when I first read the papers when considering the application for permission to appeal was the procedure which the judge followed to arrive at this outcome. My concerns have crystallised as the appeal has proceeded, and I have arrived at the regrettable conclusion that the appeal must be allowed on grounds of procedural irregularity.

44. In short, the outcome of the hearing on 12 November was that a 15-year-old boy with autism was removed from the family home he had shared for years with his father and brother against his wishes in which he did not have the opportunity to make direct representations to the court and his father had not filed any evidence on the issue of whether or not he should be removed. There is also a further concern which was not expressly raised in the grounds of appeal but which troubled the Court on reading the papers. Although the judge was clear that she was making only an interim order, and not reaching final conclusions, the care plan she approved provided for the permanent removal of Z from his father's care with the intention of placing him in the care of his mother within 3 to 6 months.

45. The first procedural irregularity concerns Z's competence to give instructions. The laws and rules governing the representation of children in family proceedings are set out in s.41 of the Children Act and Part 16 of the Family Procedure Rules, including Practice Direction 16A. This is not the place for a lengthy exegesis of the rules which are far from straightforward. For present purposes, the relevant provisions can be summarised as follows.

(1) The law distinguishes between (a) certain types of proceedings ("specified proceedings" under the Children Act and proceedings relating to adoption) in which, under s.41(1) and FPR rule 16.3 it is mandatory for the court to appoint a Cafcass officer (or a Welsh family proceedings officer) to act as guardian for a child and (b) other proceedings where (under rule 16.4) the court has the power to appoint a guardian if the circumstances require it. Examples of cases which may justify such an appointment are provided in paragraph 7.2 of PD16A.

(2) Proceedings under s.31 of the Children Act fall into the category of specified proceedings. Proceedings under s.8 of the Act do not.

(3) Although there is considerable overlap between the rules relating to the representation of children in specified and non-specified proceedings, the rules are discrete. Appointment of a guardian in specified proceedings is governed by rule 16.3, appointment in non-specified proceedings by rule 16.4. Rule 16.6 sets out circumstances in which a child may conduct proceedings without a guardian but those rules do not apply where the child is the subject of and party to specified proceedings: rule 16.6(2).

(4) Under s.41(3), in specified proceedings "where (a) the child concerned is not represented by a solicitor and (b) any of the conditions mentioned in subsection (4) is satisfied, the court may appoint a solicitor to represent him." The conditions in s.41(4) are that "(a) no officer of [Cafcass] or Welsh family proceedings officer has been appointed for the child; (b) the child has sufficient understanding to instruct a solicitor and wishes to do so; (c) it appears to the court that it would be in the child's best interests for him to be represented by a solicitor."

(5) In addition, under the rules, in both specified and non-specified proceedings, the child's guardian must appoint a solicitor for the child unless one has already been appointed: PD16A paragraphs 6.2 and 7.7.

(6) Under rule 16.29(2) and (3), a solicitor appointed under s.41(3) or by the guardian under PD16A must represent the child in accordance with instructions from the guardian unless the solicitor considers, having taken into account the guardian's views and any direction given by the court, that the child (a) wishes to give instructions which conflict with those of the guardian and (b) is able, having regard to the child's understanding, to give instructions on the child's own behalf.

(7) Attitudes to the direct participation of children in proceedings have evolved in recent years – see for example the decisions of this Court in ***Mabon v Mabon*** [2005] EWCA Civ 634, ***Re F (Children)*** [2016] EWCA Civ 536 and ***Re W (A Child)*** [2016] EWCA Civ 1051. In the latter case, Black LJ observed (paragraph 27):

> "The question of whether a child is able, having regard to his or her understanding, to instruct a solicitor must be approached having in mind this acknowledgment of the autonomy of children and of the fact that it can at times be in their interests to play some direct part in the litigation about them. What is sufficient understanding in any given case will depend upon all the facts."

(8) At paragraph 36, Black LJ expanded upon the approach to the assessment of the child's understanding in these terms:

> "Sometimes there will be a clear answer to the question whether the child is able, having regard to his or her understanding, to give their own instructions to a solicitor. In cases of more difficulty, the court will have to take a down to earth approach to determining the issue, avoiding too sophisticated an examination of the position and recognising that it is unlikely to be desirable (or even possible) to attempt to assemble definitive evidence about the matter at this stage of the proceedings. All will depend upon the individual circumstances of the case and it is impossible to provide a route map to the solution. However, it is worth noting particularly that, given the public funding problems, the judge will have to be sure to take whatever steps are possible to ensure that the child's point of view in relation to separate representation is sufficiently before the court. The judge will expect to be guided by the guardian and by those solicitors who have formed a view as to whether they could accept

> instructions from the child. Then it will be for the judge to form his or her own view on the material available at that stage in the proceedings, sometimes (but certainly not always) including expert opinion on the question of understanding (see *Re H (A Minor)(Care Proceedings: Child's Wishes)* [1993] 1 FLR 440 at page 450). Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent. If the judge requires an expert report to assist in determining the question of understanding, the child should be under no illusions about the importance of keeping the appointment with the expert concerned. It is an opportunity for the child to demonstrate that he or she does have the necessary understanding and there is always a risk that a failure to attend will be taken to show a failure to understand."

(9) It is also important to note the observation of this Court in *Re S (A Minor) (Independent Representation)* [1993] 2 FLR 437 that "understanding is not an absolute. It has to be assessed relatively to the issues in the proceedings".

46. In this case, Z has been represented by a very experienced solicitor who has assessed his competence to give instructions at various stages of the private law proceedings. In July 2020, she reviewed the issue with the guardian and provided an updated report to the court prior to the hearing in September. The judge relied on this assessment in the private law proceedings and subsequently at the interim care hearing on 12 November. It is fair to say that no party challenged that course at the hearing. It might therefore be thought unfair of this Court to criticise either the judge or the child's solicitor for the course that was taken. In my judgement, however, it was not appropriate for the court to rely on the July assessment at the hearing on 12 November, for three principal reasons. First, four months had passed since that assessment and, at Z's age, the passage of such a period of time may be significant. Secondly, the distinction in the rules between specified and non-specified proceedings obliges the court to ensure that any assessment of competence in public law proceedings focuses on the issues arising in those proceedings which involve the statutory intrusion into family life and therefore inevitably an interference with Article 8 rights. Thirdly, on the specific facts of this case, the primary issues in the two sets of proceedings were different. The primary issue in the private law proceedings was whether Z should have contact with his mother. The primary issue in the public law proceedings at the interim stage was whether he should be removed from his father. If, as this Court observed in *Re S*, the level of understanding has to be assessed relatively to the issue in the proceedings, Z's understanding of the issues surrounding the proposal that he be removed from the family home may be materially different to his understanding of the issues relating to contact with his mother.

47. There is a further reason for concern in this case to which I alluded during the hearing. Z has a diagnosis of autistic spectrum disorder. In those circumstances, he falls within the protection of the UN Convention on the Rights of Persons with Disabilities 2006. Under Article 13 (1) of the Convention:

> "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."

48. The application of this provision in the context of rules relating to representation in care proceedings was not considered in submissions before us. But it seems to me that there are strong arguments for saying that, in a case where a 15-year-old boy without disabilities would be able to participate directly in court proceedings, it is incumbent on the court and professionals working with a disabled 15-year-old boy to take such steps as may be necessary to facilitate his participation in the proceedings, particularly where the proceedings involve a fundamental question such as his removal from the family home.

49. Secondly, the decision to place Z in care was taken without any evidence from the father. The judge concluded that the father had had sufficient opportunity to file evidence, notwithstanding difficulties that arose because he needed to change solicitors for legal aid reasons. The material which the judge relied in deciding to make the interim care order came from three professionals, but in my judgment their evidence could not be described as opinion evidence. It extended to factual matters with which the father disagreed. It follows that, having regard to the distinction drawn by Peter Jackson LJ in ***Re N***, I would accept the submission that, in the very specific and unusual circumstances of this case, fairness required the father be given an opportunity to adduce evidence before a decision was taken that the boy be removed from his care. In the event, the judge made an interim care order authorising Z's removal to last until the conclusion of the care proceedings without having any evidence from the father on that issue.

50. The third irregularity concerned the care plan on the basis of which the order was made. As set out above, the plan provided for a short-term bridging placement leading to the placement of Z with his mother in 3 to 6 months, that is to say within the time span of the proceedings. Rehabilitation to his father was expressly ruled out. This plan was approved by the judge but was plainly at variance with the terms of her judgment in which she expressly made it clear that she was not making any findings or reaching a final decision. Further, as the judge had noted in the September judgement, there remain real doubts as to whether Z will ever be reconciled with his mother. Accordingly, the care plan should not have been approved by the judge and the interim care order should not have been made on the basis of that plan.

51. Curiously no party drew attention to this incongruity before it was pointed out by the Court at the outset of yesterday's hearing. Mr Harris fairly conceded the point at that the court's invitation the local authority has now filed a supplemental plan which is more congruent with the judge's interim judgement. Nevertheless, the fact remains that

Z was made subject of an interim care order on the basis of a plan that was plainly inappropriate.

52. In the circumstances, I conclude that the interim care order as made by the judge cannot stand and must be set aside. The application for an interim care order must be listed urgently for rehearing. Although I recognise that the judge carried out her functions conscientiously, I think it preferable in the interests of fairness that the proceedings now be transferred to another judge. In my view, the case is sufficiently complex to justify allocation to a judge at High Court level. If my Lords agree, I would propose remitting the proceedings to Keehan J as Family Division Liaison Judge for London to determine allocation. It is essential that the rehearing of the interim care application be listed as soon as possible in January 2021. To that end, exceptionally, I would agree that this court should give any necessary case management directions to facilitate that rehearing and I would invite the parties to attempt to agree such directions and submit an order to this court for approval.

53. The final question is what should happen to Z prior to that rehearing. Under CPR rule 50.20, this Court has all the powers of the lower court. It would have been open to the judge on 12 November to make a short-term interim care order for a few weeks and list the matter for further hearing at which evidence as to Z's competence could have been filed together with a statement from the father and an appropriately-drafted care plan. In all the circumstances, satisfied as I am that the threshold under s.38 was plainly crossed in this case, I would now propose making a short-term interim care order to last until the next hearing. That order would be made on the basis of the revised interim care plan filed by the local authority this morning. In all the circumstances, I would not consider it in Z's best interests to be returned to his father's care for the next few weeks, when there is a real possibility that he may be removed again following the rehearing.

54. For the reasons set out above, and on that basis, I would grant permission to appeal in this case, refuse the application to adduce fresh evidence, and allow the appeal.

ARNOLD LJ

55. I agree.

FLOYD LJ

56. I also agree.